TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 803

THE UNITED STATES OF AMERICA, PETITIONER

vs.

HARRY S. EMORY, ST. JAMES DISTILLERY, INC., AND ST. JAMES DISTILLERY

ON WRIT OF CERTIORARI TO THE SPRINGFIELD COURT OF APPEALS, STATE OF MISSOURI

PETITION FOR CERTIORARI FILED MARCH 1, 1941

CERTIORARI GRANTED APRIL 7, 1941

SUPREME COURT OF THE UNITED STATES

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SPRINGFIELD COURT OF APPEALS OF THE STATE OF MISSOURI

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1 In Circuit Court of Phelps County

September Term, 1936

No. 3918

HARRY S. EMORY, PLAINTIFF

vs.

ST. JAMES DISTILLERY, INCORPORATED, A CORPORATION, AND ST. JAMES DISTILLERY, A CORPORATION, DEFENDANTS

Order appointing receiver

(Sept. 9, 1936)

Now, on this day, this cause coming on to be heard, and the plaintiff herein appearing in person and by counsel, and the defendant St. James Distillery Incorporated, appearing by Joseph P. McGowan, Secretary and Treasurer of said defendant company, and defendant St. James Distillery, a Corporation, likewise appearing by said Joseph P. McGowan, he being in charge of the office, principal place of business and the affairs of both defendant corporations, and it appearing to the Court that due process had been served upon said defendants notifying them of the pendency of this proceeding, and at the time of the hearing thereon, the Court proceeded to hear the testimony and argument of counsel, and thereupon, the Court doth order, adjudge, and decree as follows:

First. The Court doth find the issues for the plaintiff, Harry S. Emory, and that he has a just claim and demand for the sum of Two Hundred Eighty-one Dollars, and doth order and decree that an injunction and restraining order be issued herein. And that the defendants, St. James Distillery Incorporated, a Corporation, and St. James Distillery, a Corporation, and then directors, officers, and agents, be, and the same are, hereby forever restrained and enjoined from conveying, transferring, or alienating any of the property, assets, or affects of said defendant companies to any person whatever, or from in anywise or to any extent controlling or attempting to exercise any control whatever over any books, accounts, property, or assets of said defendant companies.

2 Second. The Court doth order and decree that W. D. Jones be, and he is, hereby appointed received of all of the

property and assets of said St. James Distillery Incorporated and St. James Distillery, and the said receiver, or his successor, is hereby authorized to take charge and possession of all of the books, accounts, property, real and personal, belonging to said defendants, and to account for the same to the Court for the benefit of the creditors and shareholders of corporations, and to preserve and keep them until duly ordered sold by the Court, and all said property of said defendant companies is hereby vested in said W. D. Jones, Receiver, or his successor, and the Court doth further order and decree that said W. D. Jones shall duly qualify as such receiver within fifteen days from this date by filing his bond as such receiver, in the sum of Two Thousand Five Hundred Dollars, and that failing so to do, a vacancy in such receivership shall exist, to be filled in vacation on motion of either party or the Judge of the Court; and said Receiver is hereby ordered to make immediate report and filed a schedule of all the properties and assets of said company as soon as he shall take possession of the same, and further obey such order of the Court touching the premises as the Court shall make from time to time, in term or vacation.

Third. The Court doth order, decree, and adjudge that the plaintiff have and recover his costs herein laid out and expenses against the said St. James Distillery Incorporated and St. James Distillery.

Fourth. The Court doth find the issues for the plaintiff, Harry S. Emory, and that his claim and demand is a debt for wages due and common labor rendered as an employee of defendant corporations, and for and in their behalf. And that such demand is entitled to a priority of payment from the money and assests of the corporations in the hands of the receiver, and the Court doth further order, decree and adjudge that said plaintiff be, and he is, hereby declared a creditor of said defendant corporations with a right to a preference in the sum of Two Hundred Eighty-One Dollars, and that his debt shall be paid out of the funds in the hands of the receiver, on the further order of this Court for the payment of creditors.

3 In Circuit Court of Phelps County

[Title omitted.]

Order overruling motion for preference

Sept. 8, 1937

Now at this day comes the Federal Housing Administration and files their petition for preference in the said cause. And

having filed their stipulation as to facts filed as of April 22, 1937, upon which the Court bases its judgment in said cause and all the facts being seen, heard and fully understood, the Court doth overrule the motion for preference of the Federal Housing Administration.

It is therefore considered by the Court that the said Federal Housing Administration take nothing by its said motion and that the receiver pay over to the common labor the amount set aside for them together with all costs in this behalf laid out and expended, and have thereof execution.

In Circuit Court of Phelps County

Recital as to motion for new trial

[Title omitted.]

Motion for new trial filed Sept. 8, 1937.

In Circuit Court of Phelps County

[Title omitted.]

Order overruling motion for new trial

April 20, 1938

Motion for new trial heretofore filed upon being taken up and argued is by the Court overruled.

4 In Circuit Court of Phelps County

[Title omitted.]

Order allowing appeal

April 20, 1938

Affidavit for appeal filed, and appeal allowed to the Supreme Court of the State of Missouri.

In Circuit Court of Phelps County

[Title omitted.]

Order allowing filing of bill of exceptions

The Federal Housing Administration is by the Court allowed to file Bill of Exceptions at or before the next regular term of this Court, and docket fee of ten dollars paid in open court.

[Clerk's certificate to foregoing transcript omitted in printing.]

6 In Supreme Court of Missouri

HARRY S. EMORY, RESPONDENT

vs.

ST. JAMES DISTILLERY, INCORPORATED, A CORPORATION, AND ST. JAMES DISTILLERY, A COPORATION, DEFENDANTS, FEDERAL HOUSING ADMINISTRATION, APPELLANT

Appeal from the Circuit Court of Phelps County

Order transferring cause to Court of Appeals

Dec. 13, 1939

Now at this day it appearing to the satisfaction of the Court from the motion of appellant, that this court is without jurisdiction to hear and determine this cause, the court doth order that said cause be and the same is hereby transferred to the Springfield Court of Appeals.

[Clerk's Certificate to foregoing paper omitted in printing.]

8 In Circuit Court of Phelps County, State of Missouri

April Term, 1939

No. 3629

HENRY S. EMORY, PLAINTIFF

v.

ST. JAMES DISTILLERY, INCORPORATED, A CORPORATION, AND ST. JAMES DISTILLERY, A CORPORATION, DEFENDANTS, UNITED STATES OF AMERICA, INTERVENOR

Amendment of judgment and nunc pro tunc entry thereof

Now on this 19th day of June 1939, the same being the Seventh day of the regular April Term of the Circuit Court of Phelps County, come the parties herein by their attorneys, and the United States of America, Intervenor, shows the Court that in the record, as entered in the above entitled cause by the Clerk on the 8th day of September 1937, the same being the third day of the regular September Term of the Circuit Court of Phelps County, there appears the following recitals:

"Now at this day comes the Federal Housing Administration and files their petition for preference in the said cause. And having filed their stipulation as to facts filed as of April 22, 1937,

upon which the Court bases its judgment in said cause and all the facts being seen, heard and fully understood, the Court doth overrule the motion for preference of the Federal Housing Administration.

"It is therefore considered by the Court that the said Federal Housing Administration take nothing by its said motion and that the receiver pay over to the common labor the amount set aside for them together with all costs in this behalf laid out and expended, and have thereof execution.

9 "And on the same day and date the following entry also appears of record:

* * * * *

"Motion for new trial heretofore filed upon being taken up and argued is by the Court overruled.

"And on the same day and date the following entry also appears of record:

* * * * *

"Affidavit for appeal filed, and appeal allowed to the Supreme Court of the State of Missouri.

"And on the same day and date the following entry also appears of record:

* * * * *

"The Federal Housing Administration is by the Court allowed to file Bill of Exceptions at or before the next regular term of this Court, and docket fee of ten dollars paid in open court."

Intervenor further shows to the Court that the recital of the proceedings on said day should have contained a record entry that the claim of Intervenor was allowed as a common claim.

Intervenor further shows to the Court that the full record entry reciting the proceedings on said day, as appears from the minutes, files and records of the Court, should have been in the following form:

"Now on this 8th day of September 1937, come the parties by their attorneys and the United States of America, Intervenor herein, files its petition asking that its claim be allowed and that the Court find that the said claim is entitled to preference over all other claims. And the parties file, as of April 22nd, 1937, their stipulation of fact.

"The Court finds that there is due the Intervenor the sum of Five Thousand Nine Hundred Eighty-Eight Dollars and Eighty-Eight Cents ($5,988.88) principal, and the sum of Four Hundred Eleven Dollars and Seventy-Three Cents ($411.73) as interest, making a total of Six Thousand Four Hundred Dollars and

Sixty-One Cents ($6,400.61), which should be allowed as
10 an ordinary claim, but further finds that it should not be granted priority over the claims of the laborers in the distribution of the assets of the estate.

"Come now the parties and the United States of America files its motion for a new trial, and the motion is taken up and submitted to the Court, and having been by the Court duly considered it is overruled.

"It is therefore ordered and adjudged that the Intervenor, the United States of America, have and recover of the defendants the sum of Six Thousand Four Hundred Dollars and Sixty-One Cents ($6,400.61), principal and interest as aforesaid, and that it be allowed as an ordinary demand against said estate.

"It is the further order and judgment of the Court that the Intervenor's petition for a preference over the claims of the laborers be denied, and that the Intervenor take nothing by its prayer for priority in the payment of its claim and that the defendants and their receiver go hence without day.

"It is the further order and judgment of the Court that the receiver pay over to the common laborers the amounts set aside for them, together with their costs in this behalf laid out and expended, and have thereof execution.

"Come now the parties and the United States of America files its affidavit and pays to the Clerk the docket fee of $10.00, and prays for an appeal to the Supreme Court, on consideration of which it is by the Court ordered that an appeal be allowed.

"The United States of America is by the Court allowed to file its bill of exceptions on or before the next regular term of this Court."

And Intervenor moves that said record entry be corrected and amended, and entered nunc pro tunc in order to show the said facts.

And said motion having been heard, and due notice thereof having been waived by the parties herein, and the Court being satisfied from the files, minutes, and records of the Court, and by proper evidence, that said record should now be amended nunc pro tunc as of the 8th day of September 1937, to read as follows, to wit:

"Now on this 8th day of September 1937, come the parties by their attorneys and the United States of America, Intervenor herein, files its petition asking that its claim be allowed and that
11 the Court find that the said claim is entitled to preference over all other claims. And the parties file, as of April 22nd, 1937, their stipulation of fact.

"The Court finds that there is due the Intervenor the sum of Five Thousand Nine Hundred Eighty-Eight Dollars and Eighty-Eight Cents ($5,988.88) principal, and the sum of Four Hundred Eleven Dollars and Seventy-Three Cents ($411.73) as interest, making a total of Six Thousand Four Hundred Dollars and Sixty-One Cents ($6,400.61), which should be allowed as an ordinary claim, but further finds that it should not be granted priority over the claims of the laborers in the distribution of the assets of the estate.

"Come now the parties and the United States of America files its motion for a new trial, and the motion is taken up and submitted to the Court, and having been by the Court duly considered it is overruled.

"It is therefore ordered and adjudged that the Intervenor, the United States of America, have and recover of the defendants the sum of Six Thousand Four Hundred Dollars and Sixty-One Cents ($6,400.61), principal and interest as aforesaid, and that it be allowed as an ordinary demand against said estate.

"It is the further order and judgment of the Court that the Intervenor's petition for a preference over the claims of the laborers be denied, and that the Intervenor take nothing by its prayer for priority in the payment of its claim and that the defendants and their receiver go hence without day.

"It is the further order and judgment of the Court that the receiver pay over to the common laborers the amounts set aside for them, together with their costs in this behalf laid out and expended, and have thereof execution.

"Come now the parties and the United States of America files its affidavit and pays to the Clerk the docket fee of $10.00, and prays for an appeal to the Supreme Court, on consideration of which it is by the Court ordered that an appeal be allowed.

"The United States of America is by the Court allowed to file its bill of exceptions on or before the next regular term of this Court."

The Court now orders that said record be so amended.

(Signed) WILLIAM E. BARTON,
Judge of the Circuit Court of Phelps County.

12 [Clerk's certificate to foregoing paper omitted in printing.]

14 In Supreme Court of Missouri, Division I

No. 36329

HARRY S. EMORY, RESPONDENT

vs.

ST. JAMES DISTILLERY, INC., A CORPORATION, AND ST. JAMES DISTILLERY, A CORPORATION, DEFENDANTS, UNITED STATES OF AMERICA, (INTERVENOR) APPELLANT

Notice of application to transfer cause to Springfield Court of Appeals

Filed Dec. 2, 1939

TO BREUER AND NORTHERN, *Attorneys of Record for Harry S. Emory, Respondent:*

Take notice that the motion of the appellant to transfer the appeal in the above entitled cause, from the Supreme Court of the State of Missouri to the Springfield Court of Appeals, will be filed in said Court and docketed for consideration on the 8th day of December A. D. 1939.

(Signed) HARRY C. BLANTON,
United States Attorney.

Dated at St. Louis, Missouri, this 1st day of December 1939.

Receipt of a copy of the within notice and the motion is acknowledged this 2d day of December 1939.

(Signed) BREUER & NORTHERN,
Attorneys for Respondent.

15 In Supreme Court of Missouri, Division I

[Title omitted]

Motion to transfer cause to Springfield Court of Appeals

Filed Dec. 2, 1939

Comes now the United States of America, by Harry C. Blanton, United States Attorney, within and for the Eastern Judicial District of Missouri, and moves the Court to transfer the appeal now pending in Division 1 of this Court to the Springfield Court of Appeals, and for cause thereof states:

1. That the amount involved in this case is Six Hundred and Seventy Eight Dollars ($678.00);

2. That the question involved is a question of priority in the distribution of said sum as the sole remaining assets of an insolvent corporation, the conflicting claims being those of the United States claiming priority under a Federal statute and laborers claiming priority under a State statute of the State of Missouri;

3. That at the time the appeal was taken from the judgment of the Circuit Court of Phelps County, it was the opinion of officers representing the appellant that the proper appellate jurisdiction was in the Supreme Court, but, upon reconsideration,
it is the opinion of the appellant that the appeal should
16 properly have been taken to the Springfield Court of Appeals of the State of Missouri;

4. That the printed record now on file in this Court discloses the above state of facts.

Wherefore, the appellant, United States of America, moves the Court to transfer the appeal to the Springfield Court of Appeals, because of lack of jurisdiction in this Court to hear said appeal.

(Signed) HARRY C. BLANTON,
United States Attorney.

18(1) In Supreme Court of Missouri

No. 36329

HARRY S. EMORY, RESPONDENT

vs.

ST. JAMES DISTILLERY, INC., A CORPORATION, AND ST. JAMES DISTILLERY, A CORPORATION, DEFENDANTS, UNITED STATES OF AMERICA (INTERVENOR), APPELLANT

Appeal From the Circuit Court of Phelps County, Missouri

Honorable WILLIAM E. BARTON, Judge.

Appellant's abstract of the record

Filed Dec. 5, 1939

Be It Remembered that heretofore, to wit, on the 27th day of August 1936, Harry S. Emory filed in the Circuit Court of Phelps County, Missouri, his petition against the defendants, asking that a Receiver be appointed to liquidate the assets of the St. James Distillery, Inc., a corporation, and the
St. James Distillery, a corporation, located at St.
18(2) James, Missouri, on which process was duly issued and

served on the defendants, and which petition is in words and figures, as follows, to wit (caption and signatures omitted):

Petition

Plaintiff states that defendant, St. James Distillery Incorporated, and defendant, St. James Distillery, are corporations organized and existing as such under and by virtue of the laws of the State of Missouri; that their chief office and place of business is in the City of St. James, Missouri; that said defendant St. James Distillery was originally incorporated on the 23rd day of May 1935, as the St. James Development Company, with a capital stock of Two Thousand Dollars, that it thereafterwards, on the 26th day of September 1935, increased its capital stock to Ten Thousand Dollars, and that on said date the name of the corporation was changed from St. James Development Company to St. James Distillery; that defendant St. James Distillery, Incorporated, was incorporated on the 26th day of November 1935, with an authorized capital stock of Two Hundred Fifty Thousand Dollars, divided into fifty thousand shares of common stock of the par value of Five Dollars per share; that of this authorized stock, there was subscribed but twenty thousand shares of the par value of One Hundred Thousand Dollars,

18(3) of which one E. A. Maynor was a subscriber to 19,800 shares, Felix Garnier, one hundred shares, and J. W. Weger, one hundred shares, as appears by the Articles of Incorporation; that the first board of directors were said stock holders, and all the stockholders, E. A. Maynor, Felix Garnier, and J. W. Weger; that said E. A. Maynor became the president of said corporation, and has continued to remain so up to this time; that he was and is likewise the president of the board of directors of the St. James Distillery, Incorporated, and its predecessor and the St. James Development Company.

Plaintiff further states that the declared object and purpose of defendant corporations, and each of them, was primarily to "manufacture, distill, rectify, blend, compound, and otherwise prepare for use such distilled spirits of grain, fruits, and all other alcohol beverages of whatever nature as may now or hereafter be permitted by law," and to do all other things necessary in that behalf.

Plaintiff further states that at all the times herein mentioned said E. A. Maynor was the chief organizer and promoter of said defendant corporations, and not only their president, but actively in charge of the business affairs of the corporations, the business manager and in unlimited control of the property and affairs of the corporations.

Plaintiff further states that there was issued to him a certificate for five shares of the capital stock of the St. James
18(4) Distillery, and that he has a just and valid claim for common labor to the amount of two hundred eighty one dollars against defendant, St. James Distillery, Incorporated, for common labor rendered and performed at the instance and request of defendant company, through its president and manager, the said E. A. Maynor, and that he brings this suit on behalf of himself and all other persons similarly situated who might or may join in this proceeding; and that he figures said suit as a stockholder and claimant, and for those similarly situated as stated, as provided by law.

Plaintiff further states that the defendants, through their president and manager, the said E. A. Maynor, are using said defendant corporations as a means of defrauding various persons, including this plaintiff, and others similarly situated, and that said E. A. Maynor and other directors of the corporations have violated their duties and abused their powers, as officers, directors, and trustees of said corporations, and have been guilty of gross misconduct, as will hereinafter be more particularly set forth, in the management of the business of the corporations, and are threatening, and in fact are wasting, conveying, cancelling, and disposing of the assets of the companies' property.

Plaintiff further states that the said E. A. Maynor, as the promoter, organizer, and incorporator of the defendant, St. James Distillery Company, and for the purpose of pro-
18(5) curing incorporation from the Secretary of the State of Missouri, fraudulent filed with said officer a false and fraudulent statement and affidavit setting forth the value of real estate and personal property represented to be held by the incorporators, showing a value of such property of One Hundred Thousand Dollars, which was the basis of the Twenty Thousand shares of stock issued as aforesaid, and which values so placed on said property, was grossly in excess of the value thereof, which said statement and affidavit was a fraud on the Secretary of State and designed to cheat, wrong and defraud this plaintiff and all other similarly stated, and the public generally.

Plaintiff further states that said statement and affidavit so made as aforesaid by the said E. A. Maynor represents to be also verified by J. W. Weger, whose name appears thereon, and which said affidavit was not so made by J. W. Weger, as represented by the said E. A. Maynor, but his name thereon was placed without his knowledge or consent, and is a forgery and a fraud.

Plaintiff further states that the said E. A. Maynor, as president of the corporations, and in control of its business affairs has

pretended to make purchases for and in behalf of the corporation and has caused fake and fraudulent bills to be rendered for purported sales which were never made and has and is under-
18(6) taking to use such methods as a means of converting the assets of the corporation to his own use and benefit, all in fraud to plaintiff and those similarly situated.

Plaintiff further states that said E. A. Maynor, as president of the corporation, and manager, as aforesaid, has been guilty of further mismanagement and misconduct, in this, that he took a lease on real estate adjoining companies' premises, known as the Pevely property, that after such lease had been taken and signed by the parties, the said E. A. Maynor fraudulently inserted in his copy of the lease and option to buy the premises for the sum of Five Thousand Dollars, which was materially less than the market value of the said real estate, and that he fraudulently used said forged instrument for the purpose of obtaining credit and funds which were converted to his own use.

Plaintiff further states that said E. A. Maynor, as president and business manager of defendant corporations, as aforesaid, and by means of his fraudulent lease aforesaid, and otherwise interested other parties in his project and development, who were from time to time advancing the corporations, through the said E. A. Maynor, large sums of money to carry on the building and developing of the distillery for which the corporation pretended to be organized for; that in this behalf said E. A. Maynor from time to time would exhibit to such parties a pay roll of
18(7) workmen, including this plaintiff, who were employed by the corporation as common laborers, showing that so much was due them for their labor, and that said Maynor would represent that he had paid such labor in full, and the amount thereof was refunded and repaid to said Maynor by such parties; but plaintiff says that although the said Maynor procured the necessary funds, as aforesaid, to pay for his labor and all others similarly situated, that said Maynor did not pay over said money to them, but fraudulently converted the same to his own use.

Plaintiff further states that the said E. A. Maynor, as president and manager of defendant corporations, as aforesaid, fraudulently procured from the United States Government a loan for large sums of money for improvements upon real estate not owned by the corporation and in fraud of the Government.

Plaintiff further says that the said E. A. Maynor as an officer and organizer of said corporations fraudulently issued or caused to be issued, certificates of stock in said corporations which were in fact never paid for.

Plaintiff further states that the property of defendant corporations has been so mismanaged, dissipated and wasted by the

said E. A. Maynor until the remaining total assets by the most liberal appraisement would not exceed the total value of Three Thousand Five Hundred Fifty-nine Dollars, and that there
18(8) are at this time determined claims or liabilities of Four Thousand One Fifty-four Dollars, and other claims and demands allowable, not included therein, and as a result defendant corporations are hopelessly insolvent.

Plaintiff further states that in addition to his claim for common labor there are a number of other laborers similariy situated who have like claims for labors, totaling Nine Hundred Thirty-nine Dollars, all of which labor has been performed within the statutory period, and are entitled to a preference and to be made a lien.

Plaintiff further states that of the known claims and demands, as aforesaid, ther eis due Pevely Dairy Company, for rent, Three Hundred Fifty Dollars, Lawton, Byrne, Bruner, for insurance, One Hundred Seven Dollars, and that the remainder of said claims are for material furnished for which material men's liens are allowable.

Plaintiff further states that the said E. A. Maynor has abandoned said corporations and property and has absconded and his whereabouts is unknown and is reputed to be a fugitive from justice as a result of his mismanagement, frauds and misconduct in connection with the affairs of defendant corporations, and has abandoned all assets of the company and same is being dissipated and destroyed.

Plaintiff further states that he and those similarly situated have no adequate, or in fact, any remedy at law; that by reason of the insolvency of the company, and the allowing of
18(9) material men's liens, which are now in the process of being filed, and by reason of the fact the real estate of the corporations is incumbered, a judgment against said defendant corporations would be altogether worthless and unavailing, by reason of the facts aforesaid, and the further fact that much of the assets of the property would be wholly worthless unless used for the purpose procured and designed, and plaintiff says that if a receiver is appointed by this Court to take over the property and affairs of defendant corporations that he will be able to so dispose of the assets of the corporations at private sale in a manner and for a price sufficient to pay all of a substantial portion of plaintiff's claim and all others so situated which would be utterly impossible at any judicial sale under execution.

Plaintiff further states that an extraordinary condition obtains in this case, that an emergency exists and the property and assets will be entirely dissipated and destroyed by reason of the aban-

donment of the property and absconding of the said E. A. Maynor, unless a receiver be so appointed by the Court.

Wherefore, plaintiff prays that the said E. A. Maynor and all other directors, managers and officers of defendant corporations be compelled to account for their official conduct in the management and disposition of the funds, property and business of said corporation, that the Court order and decree the pay-
18(10) ment by them to the company or any receiver appointed therefor, of any sums of money and the value of the property which may have been acquired by themselves or transferred to others, or lost or wasted by the violation of their duties and the abuse of their power as such directors and officers, and that said directors and officers be suspended and restrained from exercising their offices, and that a receiver be appointed to take charge of all the property of defendant corporations both real and personal, owned, held or claimed by defendant corporations, to account for the same to the persons who may be found entitled thereto; dispose of such property, both real and personal, by order and direction of the Court, and to pay out the proceeds thereof to those entitled thereto as may be ordered by the Court; and that said corporations and their officers, and each of them, be restrained and enjoined from conveying, transferring or alienating any of the property, assets or effects of said defendant corporations to any person whatever, and that he may have judgment for his demand of two hundred eighty one dollars, and the same be paid to him by the receiver out of the funds derived from the assets of said company, and that said claim be made a preference and a lien against the property of the defendant, and for such other and further relief in the premises as plaintiff, and those who might join in this action, might be entitled to in equity and good conscience, and for general relief in the premises.

BREUER & NORTHERN,
Attorneys for Plaintiff.

18(11) *Appointment of receiver*

Thereafter, to wit, on the 9th day of September 1936, Court being opened in due form, the following among other proceedings were had in this cause, to wit (caption omitted):

Now, on this day, this cause coming on to be heard, and the plaintiff herein appearing in person and by counsel, and the defendant, St. James Distillery, Incorporated, appearing by Joseph P. McGowan, Secretary and Treasurer of said defendant company, and defendant, St. James Distillery, a Corporation, likewise appearing by said Joseph P. McGowan, he being in charge

of the office, principal place of business and the affairs of both defendant corporations, and it appearing to the Court that due process had been served upon said defendants notifying them of the pendency of this proceeding, and at the time of the hearing thereon, the Court proceeded to hear the testimony and argument of counsel, and thereupon, the Court doth order, adjudge and decree as follows:

First. The Court doth find the issues for the plaintiff, Harry S. Emory, and that he has a just claim and demand for the sum of Two Hundred Eighty-one Dollars, and doth order and decree that an injunction and restraining order be issued herein. And that the defendants, St. James Distillery, Incorporated, a Corporation, and St. James Distillery, a Corporation, and
18(12) then directors, officers and agents, be, and the same are, hereby forever restrained and enjoined from conveying, transferring or alienating any of the property, assets, or affects of said defendant companies to any person whatever, or from in anywise or to any extent controlling or attempting to exercise any control whatever over any books, accounts, property or assets of said defendant companies.

Second. The Court doth order and decree that W. D. Jones be, and he is, hereby appointed receiver of all of the property and assets of said St. James Distillery, Incorporated, and St. James Distillery, and the said receiver, or his successor, is hereby authorized to take charge and possession of all of the books, accounts, property, real and personal, belonging to said defendants, and to account for the same to the Court for the benefit of the creditors and shareholders of corporations, and to preserve and keep them until duly ordered sold by the Court, and all said property of said defendant companies is hereby vested in said W. D. Jones, Receiver, or his successor, and the Court doth further order and decree that said W. D. Jones shall duly qualify as such receiver within fifteen days from this date by filing his bond as such receiver, in the sum of Two Thousand Five Hundred Dollars, and that failing so to do, a vacancy in such receivership shall exist to be filled in vacation on motion of either party or the Judge of the Court; and said Receiver is hereby
18(13) ordered to make immediate report and file a schedule of all the properties and assets of said company as soon as he shall take possession of the same, and further obey such order of the Court touching the premises as the Court shall make from time to time, in term, or vacation.

Third. The Court doth order, decree and adjudge that the plaintiff have and recover his costs herein laid out and expenses

against the said St. James Distillery Incorporated and St. James Distillery.

Fourth. The Court doth find the issues for the plaintiff, Harry S. Emory, and that his claim and demand is a debt for wages due and common labor rendered as an employee of defendant corporations, and for and in their behalf. And that such demand is entitled to a priority of payment from the money and assets of the corporations in the hands of the receiver, and the Court doth further order, decree and adjudge that said plaintiff be, and he is, hereby declared a creditor of said defendant corporations with a right to a preference in the sum of Two Hundred Eighty-one Dollars, and that his debt shall be paid out of the funds in the hands of the receiver, on the further order of this Court for the payment of creditors.

Thereafter, to wit, on September 8th, 1937, the Federal Housing Administrator, acting for and in behalf of the United States, duly filed within the prescribed period in such cases made
18(14) and provided, its verified petition for the allowance of its claim against the defendants, and for the granting of a priority of said claim by reason of Section 3466, Revised Statutes of the United States (Section 191, Title 31, U. S. C.), said verified petition being in words and figures as follows, to wit (signatures omitted):

In the Circuit Court of Phelps County, State of Missouri
September Term, 1936

HARRY S. EMORY, PLAINTIFF

vs.

ST. JAMES DISTILLERY, INC., A CORPORATION, AND ST. JAMES DISTILLERY, A CORPORATION, DEFENDANTS

STATE OF MISSOURI,
County of Phelps, ss:

Claim of the United States of America, by and through Stewart McDonald, Federal Housing Administrator, against the St. James Distillery, Inc., a corporation, and St. James Distillery, a corporation, and W. B. Jones, receiver of Said corporations

Comes now Stewart McDonald, Federal Housing Administrator, by and through his authorized Agent, Thomas G. Mullally, District Director for the Eastern District of Missouri, and acting in his representative capacity for and on behalf of the United States of America, files this, his claim, against the above named company and its said Receiver.

Claimant states than on September 23, 1935, defendant corporation made and entered into a promissory note in the
18(15) amount of $7,481.78, said note being payable to the Industrial Bank & Trust Company of St. Louis, Missouri, in fifty nine payments of One Hundred Twenty Four Dollars and seventy cents ($124.70) and one payment of One Hundred Twenty Four Dollars and forty eight cents ($124.48). That said note was duly signed by St. James Distillery, per E. A. Maynor, Pres.; that only Three Hundred Seventy-five Dollars ($375.00) in regular installments was paid on said note by said defendant; and that said note was duly assigned to claimant by the Industrial Bank & Trust Company, for which assignment claimant, under a contract of Insurance and Guaranty, paid said Industrial Bank & Trust Company the sum of Five Thousand Nine Hundred Eighty-eight Dollars and eighty-eight cents ($5,988.88) on July 14, 1936.

Claimant further states that said moneys of the United States were lawfully expended and said debt is now legally owing to the United States in accordance with Title I of the National Housing Act (Public, No. 479—73rd Congress) (H. R. 9620), approved June 27, 1934, and amendments thereto.

Claimant further states that demand was made for full payment of this note of defendant corporation prior to the filing of action in this Court, but that no part of said claim has been paid and that same is now due and payable, together with interest, at the rate of six percent (6%) from July 14, 1936, in the amount of Two Hundred Twenty-one Dollars and sixty-five
18(16) cents ($221.65) to February 15, 1937, for a total amount due and payable of Six Thousand Two Hundred Ten Dollars and fifty-three cents ($6,210.53) as of February 15, 1937.

Claimant further states that this claim is entitled to priority in payment over and above all other claims under and by virtue of Section 191, Title 31, United States Code, and that assets are available for immediate payment of this claim.

Wherefore, the premises considered, claimant moves and prays that the Court order the above claim allowed as a claim having priority over all other claims and liabilities of the receivership estate, and that an order issued out of this Court authorizing said receiver to pay the foregoing claim forthwith, together with interest, as above set forth.

THOMAS G. MULLALLY,

District Director, Federal Housing Administration; Authorized Agent of Stewart McDonald, Federal Housing Administrator.

STATE OF MISSOURI,
City of St. Louis, ss:

On this 17th day of February 1937, personally appeared before me Thomas G. Mullally, known to me to be District Director of the Federal Housing Administration for the Eastern District of Missouri, and authorized Agent of Stewart McDonald, Federal Housing Administrator, acting on behalf of the United States of America, who did state that he has read the
18(17) statement of claim attached hereto and that said statement is true and correct to the best of his knowledge and belief.

———, *Notary Public.*

My Commission Expires ——.

Trial and findings of court

Thereafter, to wit, on the 8th day of September 1937, the same being one of the days of the regular September Term, 1937, of the Circuit Court of Phelps County, Missouri, both parties announced ready for trial and the case was submitted to the Court on the agreed statement of facts:

Thereafter, on the same day, to wit, September 8th, 1937, the Court announced and rendered its findings in favor of the Receiver and against the Federal Housing Administrator, acting for and on behalf of the United States, which said finding was as follows, to wit (caption omitted):

"All the facts being seen, heard, and fully understood, the Court did overrule the motion for preference of the Federal Housing Administration.

"It is therefore considered by the Court that the said Federal Housing Administration take nothing by its said motion and that the Receiver pay over to the common laborers the amount set aside for them together with all costs in this behalf laid out and expended and have thereof execution."

18(18) *Motion for new trial*

To which said finding the Federal Housing Administration, acting for and on behalf of the United States, then and there excepted and objected and still excepts and objects, and thereafter on the same day, to wit, the 8th day of September 1937, and during the said term, to wit, the September Term, 1937, of said Circuit Court of Phelps County, Missouri, and within four days after the finding of the Court in this cause, the appellant filed its motion for a new trial in said cause.

Motion for a new trial overruled

Thereafter, said motion for a new trial was by the Court overruled, to which action of the Court the Federal Housing Administrator, acting for and in behalf of the United States of America, objected and excepted, and still objects and excepts.

Thereafter, to wit, on June 19th, 1939, the United States made application for an amendment of the record, which was duly served upon opposing counsel, said application being in words and figures as follows, to wit (caption and signatures omitted):

Application for amendment of record

Now on this day comes the United States of America, Intervenor herein, and shows to the Court that in the record, as entered in the above entitled cause by the Clerk on the
18(19) 8th day of September 1937, the same being the third day of the regular September Term of the Circuit Court of Phelps County, there appears the following recitals:

"Now at this day comes the Federal Housing Administration and files their petition for preference in the said cause. And having filed their stipulation as to facts filed as of April 22, 1937, upon which the Court bases its judgment in said cause and all the facts being seen, heard and fully understood, the Court doth overrule the motion for preference of the Federal Housing Administration.

"It is therefore considered by the Court that the said Federal Housing Administration take nothing by its said motion and that the receiver pay over to the common laborers the amount set aside for them together with all costs in this behalf laid out and expended and have thereof execution.

"And on the same day and date the following entry also appears of record:

* * * * *

"Motion for new trial heretofore filed upon being taken up and argued if by the Court overruled.

"And on the same day and date the following entry also appears of record:

* * * * *

"Affidavit for appeal filed, and appeal allowed to the Supreme Court of the State of Missouri.

18(20) "And on the same day and date the following entry also appears of record:

* * * * *

"The Federal Housing Administration is by the Court allowed to file Bill of Exceptions at or before the next regular term of this Court, and docket fee of ten dollars paid in open court."

Intervenor further shows to the Court that the recital of the proceedings on said day should have contained a record entry that the claim of Intervenor was allowed as a common claim.

Intervenor further shows to the Court that the full record entry reciting the proceedings on said day, as appears from the minutes, files and records of the Court, should have been in the following form:

"Now on this 8th day of September 1937, come the parties by their attorneys and the United States of America, Intervenor herein, files its petition asking that its claim be allowed and that the Court find that the said claim is entitled to preference over all other claims. And the parties file, as of April 22nd, 1937, their stipulation of fact.

"The Court finds that there is due the Intervenor the sum of Five Thousand Nine Hundred Eighty-Eight Dollars and Eighty-Eight Cents ($5,988.88) principal, and the sum of Four Hundred Eleven Dollars and Seventy-Three Cents ($411.73)
18(21) as interest, making a total of Six Thousand Four Hundred Dollars and Sixty-One Cents ($6,400.61), which should be allowed as an ordinary claim, but further finds that it should not be granted priority over the claims of the laborers in the distribution of the assets of the estate.

"Come now the parties and the United States of America files its motion for a new trial, and the motion is taken up and submitted to the Court, and having been by the Court duly considered it is overruled.

"It is therefore ordered and adjudged that the Intervenor, the United States of America, have and recover of the defendants the sum of Six Thousand Four Hundred Dollars and Sixty-One Cents ($6,400.61), principal and interest as aforesaid, and that it be allowed as an ordinary demand against said estate.

"It is the further order and judgment of the Court that the Intervenor's petition for a preference over the claims of the laborers be denied, and that the Intervenor take nothing by its prayer for priority in the payment of its claim and that the defendants and their receiver go hence without day.

"It is the further order and judgment of the Court that the receiver pay over to the common laborers the amounts set aside for them, together with their costs in this behalf laid out and expended, and have thereof execution.

"Come now the parties and the United States of America files its affidavit and pays to the Clerk the docket fee of $10.00, and

18(22) prays for an appeal to the Supreme Court, on consideration of which it is by the Court ordered that an appeal be allowed.

"The United States of America is by the Court allowed to file its bill of exceptions on or before the next regular term of this Court."

Wherefore, the Intervenor now moves the Court that the said record entry be corrected and amended in the said particulars, and entered nunc pro tunc to show the above facts.

Judgment nunc pro tunc and the granting of an appeal

Thereafter, to wit: on June 19, 1939, the Circuit Court of Phelps County entered Judgment Nunc Pro Tunc as of September 8th, 1937, in words and figures as follows, omitting captions.

"And Intervenor moves that said record entry be corrected and amended, and entered nunc pro tunc in order to show the said facts.

"And said motion having been heard, and due notice thereof having been waived by the parties herein, and the Court being satisfied from the files, minutes and records of the Court, and by proper evidence, that said record should now be amended nunc pro tunc as of the 8th day of September 1937, to read as follows, to wit:

"'HEARING

"'Now on this 8th day of September 1937, come the
18(23) parties by their attorneys and the United States of America, Intervenor herein, files its petition asking that its claim be allowed and that the Court find that the said claim is entitled to preference over all other claims. And the parties file, as of April 22nd, 1937, their stipulation of fact.

"'FINDINGS

"'The Court finds that there is due the Intervenor the sum of Five Thousand Nine Hundred Eighty-Eight Dollars and Eighty-Eight Cents ($5,988.88) principal, and the sum of Four Hundred Eleven Dollars and Seventy-Three Cents ($411.73) as interest, making a total of Six Thousand Four Hundred Dollars and Sixty-One Cents ($6,400.61), which should be allowed as an ordinary claim, but further finds that it should not be granted priority over the claims of the laborers in the distribution of the assets of the estate.

"'MOTION FOR A NEW TRIAL

"'Come now the parties and the United States of America files its motion for a new trial, and the motion is taken up and submitted to the Court, and having been by the Court duly considered it is overruled

"'JUDGMENT

"'It is therefore ordered and adjudged that the Inter-
18(24) venor, the United States of America, have and recover of the defendants the sum of Six Thousand Four Hundred Dollars and Sixty-One Cents ($6,400.61), principal and interest as aforesaid, and that it be allowed as an ordinary demand against said estate.

"'It is the further order and judgment of the Court that the Intervenor's petition for a preference over the claims of the laborers be denied, and that the Intervenor take nothing by its prayer for priority in the payment of its claim and that the defendants and their receiver go hence without day.

"'It is the further order and judgment of the Court that the receiver pay over to the common laborers the amounts set aside for them, together with their costs in this behalf laid out and expended, and have thereof execution.

"'APPEAL GRANTED

"'Come now the parties and the United States of America files its affidavit and pays to the Clerk the docket fee of $10.00 and prays for an appeal to the Supreme Court, on consideration of which it is by the Court ordered that an appeal be allowed.

"'The United States of America is by the Court allowed to file its bill of exceptions on or before the next regular term of this Court.'

18(25) "The Court now orders that said record be so amended.

"(Signed) WILLIAM E. BARTON,
"*Judge of the Circuit Court of Phelps County.*"

Approved as to form.

L. H. BREUER.

Bill of exceptions filed

And thereafter, on the 20th day of August 1938, and within the time allowed by the law for the filing of its Bill of Exceptions, the appellant filed with the Clerk of the Circuit Court of Phelps County, Missouri, its said Bill of Exceptions herein, the

same having been on the 20th day of August 1938, examined, approved, signed, sealed and ordered filed by the Judge of said Court, and made a part of the record in this cause, which said Bill of Exceptions (caption omitted) is as follows:

18(26) *Bill of exceptions*

Hearing of petition

Be it remembered that this cause coming on to be heard in the above entitled Court, on September 8th, 1937, same being the third day of the regular September Term, 1937, of the Circuit Court of Phelps County, Missouri, before Honorable William E. Barton, the regular Judge of said Court, the following among other proceedings were had.

The evidence consisted of an agreed statement of facts, which was duly filed, and which was considered by the Court as the evidence in this case. The agreed statement of facts is as follows (caption and signature omitted):

Stipulation of facts

It is hereby stipulated and agreed by and between the United States of America, by and through its duly appointed and authorized attorneys, and W. D. Jones, Receiver for the St. James Distillery, Inc., a Corporation, and the St. James Distillery, a Corporation, that this cause shall be presented to the Court, a jury being hereby waived, and that the matters here involved be presented to the Court by a Stipulation of Facts; and it is hereby stipulated and agreed that the facts concerning this case are as follows:

18(27) That the St. James Distillery is a Corporation, and is located at St. James, Phelps County, Missouri.

That the St. James Distillery was hopelessly insolvent on or before August 1936, and was unable to pay its debts; that the said Distillery has been insolvent since that date, and is still insolvent; that a petition was filed on August 27, 1936, under Section 4960, Revised Statutes of Missouri, 1929, asking that a Receiver be appointed to liquidate the assets of the insolvent Corporation.

That, in accordance with that petition, the Judge of the Circuit Court of Phelps County did, on the 9th day of September 1936, appoint W. D. Jones of Bolla, Phelps County, Missouri, as Receiver of the St. James Distillery; that the said W. D. Jones, after furnishing bond and fulfilling all requirements and qualifications, entered upon his duties as said Receiver, and has so acted since that day, and is still so acting.

That the Receiver sold the property, which comprised the Distillery proper, and received from that sale the sum of One Thousand and No-100 Dollars ($1,000.00) which, it is submitted, represented the entire assets of the insolvent Corporation.

That claims were duly filed against the insolvent Corporation, and are before this Court for its consideration.

That among the claims were certain labor claims totaling about Nine Hundred and No-100 Dollars ($900.00), and
18(28) representing the claims of about twelve individuals who had done common labor for the St. James Distillery. These individuals claim a preference by reason of Section 1168, Revised Statutes of Missouri, 1929.

That there was also duly filed by the United States of America on behalf of the Federal Housing Administration, a claim in which a priority was claimed by the United States under and by virtue of Section 3466, Revised Statutes of the United States (Title 31, U. S. C. A., 191). This claim was based on a note duly executed by the insolvent debtor Corporation, and made payable to the Industrial Bank and Trust Company of St. Louis. It was dated September 23, 1935, and was in the amount of Seven Thousand Four Hundred Eighty One and 78-100 Dollars ($7,481.78). The said note was on July 14, 1936, endorsed and delivered to the Federal Housing Administration, acting for and on behalf of the United States of America, and the United States of America, through the Federal Housing Administration, on that date reimbursed the Industrial Bank and Trust Company in the amount of Five Thousand Nine Hundred Eighty Eight and 88-100 Dollars ($5,988.88), the balance due on the said note, and the United States of America, through the Federal Housing Administration, is the present holder of the said note. The claim of the United States on this note was for Five Thousand Nine Hundred Eighty Eight and
18(29) 88-100 Dollars ($5,988.88), with interest from and after the 14th day of July 1936, and it is on this indebtedness that a priority is claimed on behalf of the United States, over and above all other creditors.

The Circuit Court permitted the Receiver to make disbursements totaling about Three Hundred Twenty Two and 00-100 Dollars ($322.00), being used entirely to pay the costs of the receivership. The total assets before the Court for distribution are about Six Hundred Seventy Eight and No-100 Dollars ($678.00).

Finding and judgment

Now on this 8th day of September 1937 while the Court was still in session, and during the regular September Term, 1937,

of said Court, the Court announced and rendered his verdict and judgment herein against the United States of America, and overruling the petition of the United States of America, acting through the Federal Housing Administration, for a preference, to which ruling of the Court the United States of America then and there objected and excepted and still objects and excepts.

Thereafter, on the same day, to wit, September 8th, 1937, the United States of America filed its motion for a new trial in this cause, which said motion is in words and figures as follows (caption and signatures omitted):

18(30) *Motion of the United States for a new trial*

Now comes the United States of America by Marshall Craig, Assistant United States Attorney for the Eastern District of Missouri, and moves the Court to set aside its finding and order heretofore entered herein on the 8th day of September A. D. 1937, in the matter of the allowance of the United States for a preference in the above-entitled proceeding, and to grant claimant a new trial herein for the following reasons:

I

Because the finding and order of the Court upon the record herein are erroneous and against the law applicable to claimant's demand.

II

Because the finding and order of the Court herein are contrary to and in disregard of the terms and provisions of Sections 3466 and 3467 of the Revised Statutes of the United States (Sections 191 and 192, Title 31, U. S. C.), which statutes are applicable to the allowance of claimant's demand herein and binding upon this Court.

III

Because the finding and order herein are contrary to the adjudicated cases construing the Federal Statutes hereinabove mentioned.

18(31) IV

Because the finding and order herein are against the undisputed evidence and facts herein.

V

Because the allowance of claimant's demand as a so-called "Preferred" Claim, but placing the claim thus allowed upon a basis for payment equal with the claims and demands of other creditors of said Corporation arising since the insolvency thereof, has the effect of allowing the Government's claim only as a common one, since the admitted assets of said Corporation are insufficient to pay all of the so-called "Preferred" Claims in full.

VI

Because the Court erred in failing to find that, under the law and facts herein, the Government's claim is entitled to be allowed and paid out of the assets of said Corporation prior to and in preference of the claims and demands of other creditors.

Motion for new trial overruled

Thereafter, on the 13th day of April 1938, the United States of America's motion for a new trial being called up, the same is seen, heard, and examined by the Court, and on said day by the Court overruled, to which action in overruling said motion for a new trial, defendants then and there objected and excepted and still object and except.

18(32) *Final judgment*

Whereupon, judgment was rendered against the claim of the United States, and the motion of the United States seeking a preference was overruled.

Appeal granted

And thereafter, on the same day, that is, the 13th day of April 1938, and while the Court was in session, and during the same term at which the motion for a new trial herein was overruled plaintiff filed its affidavit for appeal in due form.

And thereafter, on the same day, to wit, April 13th, 1938, the Court by its order duly entered of record, granted the United States of America's said application for an appeal, and the appeal was granted in this cause to the Supreme Court of the State of Missouri, and the United States of America was granted until the 1st day of the next term of Court within which to file its Bill of Exceptions.

Judge's certificate

And now, within the time allowed by law, and the order of the Court comes the United States of America, and presents this its Bill of Exceptions herein containing the transcript of the proceedings herein, matters, things, and rulings of the Court, and the evidence presented, and prays the Court to sign this said Bill of Exceptions, and order the same filed and made a part
18(33) of the record of this cause, which is accordingly done this 20th day of August 1938.

WM. E. BARTON,
Judge of the Circuit Court of Phelps County, Missouri.

Approved:
HARRY C. BLANTON,
United States Attorney,
MARSHALL CRAIG,
Assistant United States Attorney.
Attorneys for Plaintiff.
BREUER & NORTHERN,
Attorneys for Trustee.

This constitutes all the record in the case necessary to a consideration of the appeal in this case as required by the rules of the Court.

Respectfully submitted.

HARRY C. BLANTON,
United States Attorney,
MARSHALL CRAIG,
Former Assistant United States Attorney,
RUSSELL VANDIVORT,
Assistant United States Attorney,
Attorneys for Appellant.

19 In the Springfield Court of Appeals

No. 6171

HARRY S. EMORY, RESPONDENT

vs.

ST. JAMES DISTILLERY, INCORPORATED, A CORPORATION, AND ST. JAMES DISTILLERY, A CORPORATION, DEFENDANTS, UNITED STATES OF AMERICA (INTERVENOR), APPELLANT

Order setting cause for hearing

And that the above-entitled cause was placed for hearing on the Springfield Docket of the March 1940, Term of the Springfield Court of Appeals.

21 1) In Springfield Court of Appeals

No. 6171

HARRY S. EMORY, RESPONDENT

vs.

ST. JAMES DISTILLERY, INCORPORATED, A CORPORATION, AND ST. JAMES DISTILLERY, A CORPORATION, DEFENDANTS, UNITED STATES OF AMERICA (INTERVENOR), APPELLANT

Appeal from the Circuit Court of Phelps County, Missouri

Appellant's statement, brief, and argument

Filed Feb. 6, 1940

21(5) *Assignments of error*

The United States assigns as error the action of the trial court:

1. In finding that the claim of the United States should not be granted priority over the claims of the laborers in the distribution of the assets of the estate.

2. In entering judgment that the petition of the United States for a preference over the claims of the laborers be denied.

3. In entering judgment that the United States take nothing by its prayer for priority in the payment of its claim.

4. In entering its order and judgment that the receiver pay over to the common laborers the amounts set aside for them, together with their costs.

5. In overruling appellant's motion for a new trial.

23 In the Springfield Court of Appeals

No. 6171

[Title omitted.]

Stipulation re continuance

Filed Feb. 22, 1940

It is hereby stipulated and agreed by and between the parties in the above-entitled matter that the above-named cause be continued to the next setting of the docket.

(Signed) HARRY C. BLANTON,
Appellant.
(Signed) BREUER & NORTHERN,
Respondent.

24 In Springfield Court of Appeals

Order resetting cause

March 7, 1940

Now at this day it is ordered by the Court that the aforesaid cause be and the same is hereby reset for the June Call.

26(1) *Respondent's statement, brief, and argument*

[Omitted in printing.]

27 In Springfield Court of Appeals

Minute entry of argument and submission

June 11, 1940

Now again comes the appellant aforesaid, by its attorneys, and after argument herein submits this cause to the Court, and the said respondent and his attorneys failing to appear when called, this cause is taken as submitted by respondent upon brief.

28 In Springfield Court of Appeals

Judgment

Aug. 22, 1940

Now again come the parties aforesaid, by their respective attorneys, and the Court being now sufficiently advised of and

concerning the premises, doth consider and adjudge that the judgment rendered herein by the said Circuit Court of Phelps County be in all things affirmed and stand in full force and effect, and that the said respondent recover of the said appellant costs and charges herein expended, and have execution therefor.

Opinion filed.

29 In Springfield Court of Appeals

March Term, 1940

No. 6171

HARRY S. EMORY, RESPONDENT

vs.

ST. JAMES DISTILLERY, INC., A CORPORATION, AND ST. JAMES DISTILLERY, A CORPORATION, DEFENDANTS, UNITED STATES OF AMERICA (INTERVENOR), APPELLANT

Appeal from the Circuit Court of Phelps County, Mo.

Hon. WILLIAM E. BARTON, Judge.

Harry C. Blanton, Sikeston, Mo., United States Attorney; Marshall Craig, Charleston, Mo., Former Assistant United States Attorney; Russell Vandivort, Cape Girardeau, Mo., Assistant United States Attorney, Attorneys for Appellant. Breuer & Northern, Rolla, Mo., Attorneys for Respondent.

Affirmed.

Opinion

Filed Aug. 22, 1940

W. D. TATLOW, P. J.

This case was appealed to the Supreme Court of the State, and by that court transferred here on the motion of appellant without an opinion.

I

There is no point made on the pleadings. The case was tried on an agreed statement of facts, which is in words and figures as follows:

"It is hereby stipulated and agreed by and between the United States of America, by and through its duly appointed and authorized attorneys, and W. D. Jones, Receiver for the St. James Distillery, Inc., a Corporation, and the St. James Distillery, a

Corporation, that this cause shall be presented to the Court, a jury being hereby waived, and that the matters here involved be presented to the Court by a Stipulation of Facts; and it is hereby stipulated and agreed that the facts concerning this case are as follows:

"That the St. James Distillery is a Corporation, and is located at St. James, Phelps County, Missouri.

"That the St. James Distillery was hopelessly insolvent on or before August 1936, and was unable to pay its debts; that the said Distillery has been insolvent since that date, and is still insolvent; that a petition was filed on August 27, 1936, under Section 4960, Revised Statutes of Missouri, 1929, asking that a Receiver be appointed to liquidate the assets of the insolvent Corporation.

"That, in accordance with that petition, the Judge of the Circuit Court of Phelps County did, on the 9th day of September 1936, appoint W. D. Jones of Rolla, Phelps County, Missouri, as Receiver of the St. James Distillery; that the said W. D. Jones, after furnishing bond and fulfilling all requirements and qualifications, entered upon his duties as said Receiver, and has so acted since that day, and is still so acting.

"That the Receiver sold the property, which comprised the Distillery proper, and received from that sale the sum of One Thousand and No-100 Dollars ($1,000.00) which, it is submitted, represented the entire assets of the insolvent Corporation.

"That claims were duly filed against the insolvent Corporation, and are before this Court for its consideration.

"That among the claims were certain labor claims totaling about Nine Hundred and No-100 Dollars ($900.00), and representing the claims of about twelve individuals who had done common labor for the St. James Distillery. These individuals claim a preference by reason of Section 1168, Revised Statutes of Missouri, 1929.

"That there was also duly filed by the United States of America on behalf of the Federal Housing Administration, a claim in which a priority was claimed by the United States under and by virtue of Section 3466, Revised Statutes of the United States (Title 31, U. S. C. A., 191). This claim was based on a note duly executed by the insolvent debtor Corporation, and made payable to the Industrial Bank and Trust Company of St. Louis. It was dated September 23, 1935, and was in the amount of Seven Thousand Four Hundred Eighty One and 78-100 Dollars ($7,481.78). The said note was on July 14, 1936, endorsed and delivered to the Federal Housing Administration, acting for and on behalf of the United States of America, and the United States

of America, through the Federal Housing Administration, on that date reimbursed the Industrial Bank and Trust Company in the amount of Five Thousand Nine Hundred Eighty Eight and 88-100 Dollars ($5,988.88), the balance due on the said note, and the United States of America, through the Federal Housing Administration, is the present holder of the said note. The claim of the United States on this note was for Five Thousand Nine Hundred Eighty Eight and 88-100 Dollars ($5,988.88), with interest from and after the 14th day of July 1936, and it is on this indebtedness that a priority is claimed on behalf of the United States, over and above all other creditors.

"The Circuit Court permitted the Receiver to make disbursements totaling about Three Hundred Twenty Two and 00-100 Dollars ($322.00), being used entirely to pay the costs of the receivership. The total assets before the Court for distribution are about Six Hundred Eight and No-100 Dollars ($678.00)."

The judgment of the court allowed the claim of the Government only as a general claim against the assets of the said estate, and subject to the claims of the laborers.

The assignments of error are, in substance, that the court erred in not granting priority to the United States for the debt due it over the claims of laborers in the distribution of the assets of the estate.

From the agreed statement, it appears that the insolvency occurred on or before August 1936; that the receivership petition was filed on August 27th, 1936, praying for the appointment of a receiver to liquidate the assets of the corporation; and that the receiver was appointed on the 9th day of September 1936, and duly qualified and took possession of the property of the insolvent corporation.

The United States acquired the note on which it asserts priority, on July 14th, 1936, before the appointment of the receiver, and the balance due thereon is largely in excess of the entire assets of the insolvent corporation. The claims due the laborers aggregate about $900.00 and are also in excess of the assets of the insolvent corporation, which amount to only about $678.00.

32 II

The respondent insists that a Federal question is involved and the case should be sent back to the Supreme Court.

Even if we agreed with this contention (which we do not), we would be concluded by the order of the Supreme Court transferring the case here.

It is perfectly plain that there is nothing in the contention. The Missouri Constitution confers upon the Supreme Court jurisdiction "of cases where the validity of a * * * statute of * * * the United States is drawn in question". Under this provision, the validity of the statute must be drawn in question and it is not sufficient to confer jurisdiction on that court that the construction of a Federal statute is required. Livestock Commission Co. v. C. M. & St. Paul Ry., 157 Mo. 518, 57 S. W. 1070; Hohlstein v. Roofing Co., 328 Mo. 899, l. c. 908, 42 S. W. (2d) 573.

III

The Supreme Court of the United States in several recent cases has held that the note acquired by the United States by assignment to the Federal Housing Administrator as its instrumentality or agent, before the appointment of the receiver, is a debt due it which is preferred under Section 3466, Revised Statutes of the United States. Section 191, Title 31, U. S. Code Annotated; Graves v. N. Y., 306 U. S. 466, 477; Pittman v. Home Owners' Loan Corp. 308 U. S. 21, 32, 33; United States v. Summerlin, decided May 27, 1940, 84 L. Ed. Ad. Sheet No. 16, pp. 963, 966.

The power of the Congress of the United States to give preference to the debts of the Government of the United States even over those of the several states, and of all other persons is very clearly stated in numerous cases by the Supreme Court of the United States. It is equally true that the acts of Congress prevail over the state statutes. These rules have been announced in numerous cases. Lane County v. Oregon, 7 Wall, 71, 19 L. 101; County of Spokane v. United States, 278 U. S. 80, 95, 73 L. 621. People of the State of New York v. Maclay, et al, 288 U. S. 290, 294, 77 L. 754. United States v. Knott, State Treasurer, 298 U. S. 544, 552, 80 L. 1321.

It is also well settled that a mere inchoate lien is not enough to defeat the priority granted the United States by the statute supra. United States v. Knott, 298 U. S. 544, 80 L. 1321. New York v. Maclay, 288 U. S. 290, 77 L. 754. Spokane County v. United States, 279 U. S. 80, 73 L. 621.

Under these authorities it is perfectly plain beyond any possible doubt that the United States is given priority over any and all debts or other claims whose priority is based solely on a state statute that does not create a completed and perfected lien before insolvency intervenes.

In the instant case the priority of the laborers' claims must be and is based on the state statute as to all debts except those due

the United States. The priority, if any, that such labor claims may have over the debt due the United States, must be determined by the state statute and by whether it is in conflict with the statutes of the United States, as construed by the Supreme Court of the United States. In order for such claims to have priority over the debt due the United States they must come within both statutes.

There are two cases decided by the Supreme Court of the United States in which, while the facts are entirely different, the line of reasoning employed in arriving at the conclusion would seem to be decisive of the instant case. The first case is Brainwell v. U. S. F. & G. Co., 269 U. S. 483, 492, 70 L. 368, where, among other things, it is said:

34 "The specified ways in which insolvency may be manifested include all cases in which an insolvent debtor makes an assignment of his property; there is no exception, and no regard is had to the purpose or manner of the assignment; and they include all cases in which an act of bankruptcy is committed under the laws of a state or under a national bankruptcy law. * * *." (l. c. 489).

"* * *. The priority given does not depend on any proceeding under the bankruptcy laws of state or nation. There is nothing in the language of the section, and no reason has been suggested, to indicate a purpose to give priority in the case of a debt due the United States from a debtor subject to the Bankruptcy Act and to deny priority, under like circumstances, when the debt is due from an insolvent bank or other debtor to whom the act does not apply. * * *. The generality of the language is significant. * * *." (l. c. 490).

A late decision of the Supreme Court dealing with this question is: U. S. v. Marxen, 307 U. S. 200, 208, 83 L. 1222. In this case the note was acquired by the United States after bankruptcy, and, for this reason, priority was denied.

"* * *. Section 3466 of the Revised Statutes, the basis for the claimed priority, provides that 'Whenever any person indebted to the United States is insolvent * * * the debts due to the United States shall be first satisfied; and the priority hereby established shall extend * * * to cases in which an act of bankruptcy is committed.' * * *. (l. c. 203).

* * * * *

"* * *. 'As this statute has reference to the public good it ought to be liberally construed.' It has been said that 'nothing else appearing' even claims under the railroad Federal Control Act would be entitled to priority. But this principle of construction is subject to the limitation that the generality of the

language of the section is restricted by the purpose to grant priority to the United States, only, and by legislative intention, as shown by other statutes. * * *." (l. c. 206).

Under the Missouri statute, Section 1168 R. S. 1929, priority is given to "debts owing to laborers or servants which have accrued by reason of their labor or employment, to an amount not exceeding $100.00 to each employee, for work or labor performed within six months next preceding the seizure or transfer of such property."

Under Title 11, "Bankruptcy," Section 104, priority is given for:

35 "* * *: (5) wages due to workmen, clerks, traveling or city salesmen, or servants, which have been earned within three months before the date of the commencement of the proceeding, not to exceed $600 to each claimant: * * * and (7) debts owing to any person who by the laws of the States or the United States is entitled to priority: * * *."

The Bramwell case, supra, is direct authority for the proposition that the statute giving priority to the United States is to be construed liberally and not literally, and that the taking of possession of the property by a state receiver is the equivalent of an assignment and is itself an act of bankruptcy so as to be brought within the statute.

By the same line of reasoning, the general language of the statute is to be construed liberally for the purpose of determining the rank or order of priority. Even though it is plain that the United States is given priority under the section supra, for debts due it, it does not follow that the priority so given is superior to the labor debts as defined in the bankruptcy act. By the same token that a liberal construction makes the appointment of a receiver equivalent to a voluntary assignment, a liberal construction makes such proceeding equivalent to a proceeding in bankruptcy. If it were a proceeding in bankruptcy then, under the express provision of the Bankruptcy Act, wages due workmen, earned within three months and not to exceed $600.00 each, would be given priority over the priority of the debt to the United States.

It is expressly decided in the Bramwell case, supra, that the priority does not depend on whether the proceeding is in bankruptcy or a state proceeding which is equivalent to bankruptcy. There is nothing to be found in the section indicating a purpose to grant priority to labor debts, over debts due the United States, where the proceeding is in bankruptcy, and deny it where it is not in bankruptcy, if both proceedings are in

36 substance the same. For the same reason there is noth-

ing to indicate a purpose to give the respective priorities a different rank in such proceedings.

The same line of reasoning was the basis for the decision of the Supreme Court in the Marxen case, supra, where it is expressly and clearly decided that the legislative intent is to be determined, not only by the general language of Section 3466, supra, but as such intention is shown in other statutes of the United States relating to the same subject.

The state statute, supra, clearly purports to give priority to labor claims over all debts, including those of the United States. Whether it, in fact, does so depends upon whether it is in conflict with Section 3466, or the extent of the conflict.

Read literally and construed strictly there is a conflict. Giving it a liberal construction, as do the cases supra, and construing the state statute not only with Section 3466, supra, but also with the Bankruptcy Act, which, in terms of precision and of crystal clarity, gives preference to labor claims even over debts due the United States, the state statute does not conflict with Section 3466, supra, for the reason that said section 3466 permits the state to give priority to labor claims where such claims do not exceed $600.00 each and were earned within three months prior to the appointment of the receiver. While the state statute could not, without the consent of Congress, under the authorities supra, create a priority over debts due the United States, the acts of Congress can and do impliedly permit the state to grant priority for labor claims over debts due the United States, to the extent provided for by the Bankruptcy Act.

Section 3466, supra, and the Bankruptcy Act are limitations on the state authority, but so long as the state statute conforms to the general policy of those statutes, the state is acting
37 within the orbit of its authority in dealing with labor claims.

The cases supra cannot be distinguished on the ground that they adopt a liberal construction of section 3466, supra, only for the purpose of establishing priority in favor of the debts due the United States, because in the cases supra a liberal construction was given to the statute for the purpose of denying priority to the United States where such preference conflicted with the broad policy of the Government relating to the matter under consideration. If the debts due the laborers in the instant case were created within three months before the receivership and are for less than $100.00 each, they fall within both the state statute and the Bankruptcy Act and have priority over the priority of the United States for debts due it, as provided in Section 3466 supra. This is so for the reason that, when the

statute granting priority to the United States for debts due it, is read in connection with both the Missouri statute and the Bankruptcy Act relating to debts of laborers, the intention of Congress to permit the state to give priority to such laborers, even over debts due the United States, would seem to us to be quite plain, especially in view of the fact that it is directly held in the Marxen case, supra, that we are not confined solely to the priority statute to determine the intent of Congress with reference to such labor claims, but that such intent is to be gathered from the Bankruptcy Act, supra, and from other acts of Congress relating to the same subject.

The national and state governments have long had a very definite policy with reference to this subject.

It is nowhere better stated than in a case rendered by the District Court in 1906, In re Erie Lumber Co., 150 Fed. 817, l. c. 823, where it is said:

38 "The protection of the wages of labor is a primary duty of society and of government. The wage-earner constitutes an immense proportion of those who labor for the common welfare. So long as he remains helpful and self-sustaining, every prosperous result follows. In those unhappy epochs when the individual laborer is helpless, he and those dependent upon him become a charge upon the public. When labor en masse becomes helpless, when it is no longer possible to earn the means of subsistence, government itself is threatened, and revolution has often followed. It is therefore profoundly and philosophically true that it is the duty of government in every contingency to secure his earnings to the wage-earner. This truth is at the basis of those laws which attempt to accomplish the result upon which the existence of orderly society may itself depend. National and state legislation sedulously attempt to accomplish this, and otherwise to ameliorate the condition of the laboring man. *The courts with equal solicitude strive to attain the same end.* * * *." [Italics ours.]

The solicitude of the Federal Government for the protection of common laborers and the securing to them of the payment of their wages is not only clearly manifested by the Bankruptcy Act, supra, but by numerous other recent statutes—such, for instance, as the act commonly referred to as a floor for wages and a ceiling for hours, and the act creating the labor relations board. In recent years the United States Government has spent millions and perhaps billions for the sole and primary purpose of giving all laborers employment, and to further the economic theory of increasing the purchasing power of the ordinary laborer, in the hope of thereby permanently restoring prosperity. This is

clearly shown by the P. W. A. act, creating projects to which the government makes large contributions to keep those who would otherwise be out of employment gainfully employed.

The National Housing Act under which the debt to the Government in the instant case came into existence, has a like general purpose. It is an emergency measure to span the period until private lenders and investors "make ample credit available
39 for the purpose of financing alterations, repairs, etc." It also has for one of its primary purposes the creation of jobs for those unemployed, as well as the furnishing of better homes to those of lower earnings. The broad public policy clearly indicated by these statutes and others that might be mentioned prevents the granting of priority to the government in the instant case, over the claims of those laborers. In Mellon v. the Michigan Trust Co., 271 U. S. 236, 70 L. Ed. 924, l. c. 926, the court, holding against Federal priority, said:

"* * *. To permit the claim preference, we think, would conflict with the spirit and broad purpose of the statute. These become plain enough upon consideration of the just ends which Congress had in view together with the recent policy, revealed by the Bankruptcy Act, in respect of priorities."

This rule is announced and reaffirmed in Armstrong Paint & Varnish Works v. Nu-Enamel Corporation, 305 U. S. 315, l. c. 333, 83 L. Ed. 195, l. c. 205, where it is said:

"* * *. We have refused to nullify statutes, however hard or unexpected the particular effect, where unambiguous language called for a logical and sensible result. Any other course would be propery condemned as judicial legislation. However, to construe statutes so as to avoid results glaringly absurd, has long been a judicial function. Where, as here, the language is susceptible of a construction which preserves the usefulness of the section, the judicial duty rests upon this Court to give expression to the intendment of the law."

In the instant case we think the result would be glaringly absurd to sustain the contention of the Government that its preferred claim has priority over the claims of these common laborers. The statute relied upon is written in very general terms. There is no plain and unambiguous language in it requiring such construction. The broad policy of the Government in dealing with such claims is clearly and unambiguously expressed in the bankruptcy act, which not only gives preference to such labor claims, but gives priority over the debts due the United States. It is directly and clearly held in the Bramwell case, supra, that it is immaterial whether the proceeding be actually and
40 technically in bankruptcy, or a state proceeding which is the equivalent of a bankruptcy proceeding, for the pur-

pose of determining whether the Government is entitled to priority under Section 3466, Revised Statutes. On exactly the same principle and for the identical reason it is immaterial in the instant case that this is not strictly a bankruptcy proceeding for the purpose of determining whether these labor claims are given a preference and priority over the preferred claim of the Government.

The question that has given us the most serious trouble in the instant case is that the agreed statement is rather loosely drawn and does not clearly disclose the details with reference to these labor claims. All that is said concerning them is:

"That among the claims were certain labor claims totaling about nine hundred and no/100 dollars ($900) and representing the claims of about twelve individuals who had done common labor for the St. James Distillery. These individuals claim a preference by reason of Section 1168, Revised Statutes of Missouri, 1929."

This statement does not bring the claims strictly within the state statute. It does not show that they do not exceed $100.00 each and were for wages earned during the six months immediately preceding the receivership. Neither does it bring the claims within the Bankruptcy Act, which requires that the claims shall not exceed $600.00 each, and be for wages earned within three months before the date of the commencement of the proceeding.

It is fairly inferable that none of the claims exceed $100.00 as they average only $75.00 each, which would indicate they were earned less than three months before the appointment of the receiver, so as to come within both the state statute and the Bankruptcy Act. The contention of the Government in the trial court and again in this court has always been, and is, that it is entitled to priority over the claims of laborers, notwith-
58 standing their respective amounts or the time in which the wages were earned. It is a well settled rule of procedure in this state that the parties are bound and concluded by the theory upon which the case was tried in the lower court, and the instant case was tried on that theory, not only in the lower court, but in this court. Young v. Greene County, 342 Mo. 1105, l. c. 1116, 119 S. W. (2d) 369; Toroian v. Park View Amusement Co. 331 Mo. 700, l. c. 704, 705, 56 S. W. (2d) 134; Benz v. Powell, 338 Mo. 1032, l. c. 1036, 1037, 93 S. W. (2d) 877; Cook v. Sears, Roebuck & Co., 71 S. W. (2d) 73.

On the argument of the case counsel for the appellant was asked the question, by the writer, whether or not the facts were that the claims were for less than $100.00 each, and were for wages earned within three months prior to the receivership, and

he stated that they were. Hence, we have concluded that we are not compelled to reverse the case and remand it so as to require a finding by the trial court that the labor claims do not exceed $100.00 each and were earned within three months before the appointment of the receiver, so as to bring them within both the state statute and the Bankruptcy Act, which was in force when the receiver in the instant case was appointed.

The judgment is erroneous in not allowing the Government's claim as a preferred one, but inferior to the preferred claims of the laborers. As the laborers' claims exceed the entire assets in the hands of the receiver, after paying the costs of the proceeding, the error is harmless. The appellant would not have received anything on its claim if it had been properly allowed.

42 For these reasons we think the judgment should be, and is affirmed.

W. D. TATLOW,
Presiding Judge.

SMITH, J., concurs.
FULBRIGHT, J., concurs.

44 In Springfield Court of Appeals

[Title omitted.]

Notice of motion for rehearing

Filed Aug. 30, 1940

To Messrs. BREUER AND NORTHERN, *Attorneys for Respondent:*

Take notice that the undersigned will file with the Clerk of the Springfield Court of Appeals a Motion for a Rehearing in the above entitled matter on Saturday, August 31st, 1940.

A copy of said motion is attached hereto.

(Signed) HARRY C. BLANTON,
Harry C. Blanton, *U. S. Attorney.*
(Signed) HERBERT H. FREER,
Herbert H. Freer, *Asst. U. S. Attorney.*
(Signed) RUSSELL VANDIVORT,
Russell Vandivort, *Asst. U. S. Attorney.*
(Signed) WILLIAM L. MAHER,
Wm. L. Maher, *Spec. Asst. U. S. Attorney.*

Served by mailing a copy of the within notice to Respondent's Attorneys of record this 29th day of August 1940.

(Signed) RUSSELL VANDIVORT,
Assistant U. S. Attorney.

45 In Springfield Court of Appeals
March Term, 1940

[Title omitted.]

Appellant's motion for rehearing

Filed Aug. 30, 1940

Comes now the Appellant and moves the Court to set aside its opinion and judgment rendered and filed herein on the 22nd day of August 1940, and grant a rehearing for the following reasons:

I

The decision is in conflict with an express statute in that the claims of certain laborers are accorded priority over the claim of the United States, which is contrary to Section 3466, Revised Statutes of the United States, Section 191, Title 31, United States Code Annotated, which provides:

"SECTION 191. Priority Established. Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, *the debts due to the United States shall be first satisfied;* * * *" [Italics supplied.]

46 II

The decision is in conflict with decisions of the Supreme Court of Missouri with reference to statutory construction in that the Court considered the Bankruptcy Act to determine the extent of priority granted by Section 346, notwithstanding the fact that said Section is unambiguous and the language is clear that "the debts due the United States shall be first satisfied."

In State ex rel. Jacobsmeyer v. Thatcher, 338 Mo. 622, 92 S. W. (2d) 640, l. c. 643, the Supreme Court of Missouri held that where the language of an Act is clear, no statutory construction contrary to its evident intent is permissible. The Court said:

"We are not persuaded that the lawmakers intended to make any provision for St. Louis County in this particular case: First, because the language of the enactment is perfectly clear and unambiguous. In such case there is nothing to construe, and no intent contrary to the evident intent can rationally or permissibly be implied."

The same Court in State ex rel. Wabash Ry. Co. v. Shain, 341 Mo. 19, 106 S. W. (2d) 898, l. c. 900, said:

"If the intention is clearly expressed, and the language used is without ambiguity, all technical rules of interpretation should be rejected."

III

The decision is in conflict with the decisions of the Federal Courts with reference to statutory construction in that the Court considered the Bankruptcy Act to determine the extent of priority granted by Section 3466, in spite of the fact that said Section is unambiguous and the language is clear that "the debts due to the United States shall be first satisfied."

In the case of Andrews, et al. v. St. Louis Joint Stock Land Bank, 107 Fed. (2d) 462, l. c. 470 (Mo. C. C. A. 8), the Court held that under such circumstances no statutory construction contrary to its evident intent is permissible and the Court said:

47 "We have said that if the statutory meaning is clear, there is no occasion for rules which aid in ascertaining the meaning of the statute, and that neither legislative nor executive construction was of any aid or of force" (with citations).

IV

The decision is in conflict with a decision of the Supreme Court of Missouri with reference to statutory construction in that the Court considered the Bankruptcy Act to determine the extent of priority granted by Section 3466, in spite of the fact that the Bankruptcy Act is a special Act and applies only to bankruptcy cases.

In State vs. Smith, 334 Mo. 653, 67 S. W. (2d) 50, l. c. 57, the Court held that when special acts and general statutes relate to the same subject matter, the special act will prevail only as far as the particular subject matter comes within its provisions. The Court said:

"It is also a rule that where two statutes treat of the same subject matter, one being special and the other general, unless they are irreconcilably inconsistent, the latter, although later in date, will not be held to have repealed the former, but the special act will prevail in its application to the subject matter as far as coming within its particular provisions."

V

The decision is in conflict with decisions of the Federal Courts and other State Courts, which hold that the Bankruptcy Act and

State priority laws do not operate to give laborers priority over the United States in Receivership cases because the Bankruptcy Act applies only to bankruptcy cases.

In Piedmont Corporation v. Gainesville & N. W. R. Co., 30 Fed. (2d) 525, l. c., 529, 530 (D. C. N. D. Ga.), the Court under circumstances identical with the case at bar, accorded the
48 claim of the United States priority over the claim of certain laborers. The Court said:

"But by Sections 2793 and 2795 of the Code of Georgia, enacted prior to the making of the mortgage here involved, employees are given a lien on the railroad and other property of the company. * * *."

"But the so-called liens must yield to the priority given the United States, for being generally applied to all the property of the company, they are really only a priority in distribution like a judgment lien, which must yield to the statute of Congress as construed by the Supreme Court. This not being a case in bankruptcy, the ruling in Guarantee Title and Trust Co. v. Title Guaranty & Surety Co., 224 U. S. 152, 32 S. Ct. 457, 56 L. Ed. 706, is not applicable to save even the claims of laborers."

The same rule was followed in Kupshire Coats, Inc. v. United States, 272 N. Y. 221, 5 N. E. (2d) 715; Carpenter vs. Wabash Ry. Co., 103 Fed. (2d) 996 (Mo. C. C. A. 8), and New York vs. Maclay, et al., Receivers, et al., 288 U. S. 290.

SUGGESTIONS IN SUPPORT OF MOTION FOR REHEARING

Appellant respectfully suggests that the motion for a rehearing in this case be granted for the reason that the decision is in conflict with the various decisions of the State and Federal Courts therein mentioned.

The decision heretofore handed down sustains the contentions of this appellant that the note acquired by the United States by assignment to the Federal Housing Administrator as its instrumentality or agent, before the appointment of the receiver in this case is a debt due it which is preferred under Section 3466, Revised Statutes of the United States, and that by reason of said Section, the claim of the United States is given priority
49 over all other claims whose priority is based solely on a State statute, because Acts of Congress prevail over State statutes.

The decision then states that Section 3466 does not conflict with the State statute granting priority to laborers "for the reason that said Section 3466 permits the State to give priority to labor claims where such claims do not exceed $600.00 each, and were earned within three months prior to the appointment of the Re-

ceiver," because "the Acts of Congress can and do impliedly permit the State to grant priority for labor claims over debts due the United States, to the extent provided for by the Bankruptcy Act."

I

THE DECISION IS IN EXPRESS CONFLICT WITH ESTABLISHED RULES OF STATUTORY CONSTRUCTION AS ANNOUNCED BY THE MISSOURI SUPREME COURT AND THE FEDERAL COURTS

Appellant respectfully submits that the Court erred in considering the Bankruptcy Act for the purpose of construing the extent of the priority of the United States under Section 3466, because the language of said Section is unambiguous and it specifically states that under the circumstances in this case "the debts due to the United States shall be first satisfied." The Courts of this State as well as United States Courts have repeatedly held that where the language of an Act is clear, no construction contrary to the evident intent is permissible.

In State ex rel Jacobsmeyer v. Thatcher, 338 Mo. 622, 92 S. W. (2d) 640, l. c. 643, the Supreme Court of Missouri announced the following rule. The Court said:

"We are not persuaded that the lawmakers intended to make any provision for St. Louis County in this particular case: First, because the language of the enactment is perfectly clear and unambiguous. In such case there is nothing to construe, and no intent contrary to the evident intent can rationally or permissibly be implied."

50 The same Court in State ex rel Wabash Ry. Co. v. Shain, 341 Mo. 19, 106 S. W. (2d) 898 l. c. 900, said:

"If the intention is clearly expressed, and the language used is without ambiguity, all technical rules of interpretation should be rejected."

The Federal Courts follow the same rule of construction. In the case of Andrews et al. v. St. Louis Joint Stock Land Bank, 107 Fed. (2d) 462 l. c. 470 (Mo. C. C. A. 8), the Court used the following language:

"We have said that if the statutory meaning is clear, there is no occasion for rules which aid in ascertaining the meaning of the statute, and that neither legislative nor executive construction was of any aid or of force." (With citations.)

Appellant further submits that the Court erred in considering the Bankruptcy Act for the purpose of construing the extent of the priority of the United States under Section 3466 in a receivership case because said section is a general statute and the Bank-

ruptcy Act is a special Act, which applies only to bankruptcy cases. It is a well settled rule of statutory construction that where special and general statutes relate to the same subject matter, the special Act will prevail only as far as the particular subject matter comes within its provisions. In State v. Smith, 334 Mo. 653, 67 S. W. (2d) 50 l. c. 57, the Court said:

"It is also a rule that where two statutes treat of the same subject matter, one being special and the other general, unless they are irreconcilably inconsistent, the latter, although later in date, will not be held to have repealed the former, but the special act will prevail in its application to the subject matter as far as coming within its particular provisions."

In other words, under the Missouri rule of statutory construction, the Bankruptcy Act being a special one, its terms are only applicable to estates being administered by a Bankruptcy Court pursuant to said Act, and are not applicable to estates in receivership.

51

II

THE DECISION IS IN CONFLICT WITH PRIOR FEDERAL AND STATE DECISIONS INVOLVING THE SAME QUESTION OF LAW

Appellant submits that the motion for rehearing should be granted because the decision is in conflict with prior Federal and State decisions involving exactly the same question.

The Courts have repeatedly held that decisions with reference to Federal statutes are binding upon State Courts.

State v. Nortoni, 331 Mo. 764, 55 S. W. (2d) 272.

Foster Lumber Co. v. Atchison, 270 Mo. 629, 194. S. W. 281.

Donovan v. Wells Fargo, 265 Mo. 231, 177 S. W. 839.

Williams v. Terminal R. R. Association, 339 Mo. 594, 98 S. W. (2d) 651. Cert. den., 300 U. S. 669.

Chesapeake & Ohio v. Martin, 283 U. S. 209.

The decision in the case at bar followed that rule and consideration was given to the decisions of the Federal Courts, namely, Bramwell vs. United States Fidelity & Guaranty Co., 269 U. S. 483, and In Re Marxen, 307 U. S. 200, in an effort to arrive at the proper construction of Section 3466, although this Court admitted that the facts of those two cases were entirely different from the facts in the case at bar.

Appellant's further research has disclosed that the exact question involved in this case has already been the subject of a decision of a Federal Court, which decision is of course binding upon this Court. In the case of Piedmont Corporation v. Gaines-

ville & N. W. R. Co., 30 Fed. (2d) 525, l. c., 529, 530 (D. C. N. D. Ga.), which involved a railroad receivership, the question arose as to whether a claim of the United States for money loaned to the railroad should have priority under Section 3466 over
52 certain claims of laborers, which were entitled to priority under the State law and which would have been entitled to priority over the claim of the United States if the estate had been in bankruptcy.

The Court, after careful consideration of the problems involved, found that the claim of the United States was entitled to priority over the claims of the laborers and specifically decided that the laborers were not aided by the Bankruptcy Act because the proceedings were not Bankruptcy proceedings. The Court said:

"But by Sections 2793 and 2795 of the Code of Georgia, enacted prior to the making of the mortgage here involved, employees are given a lien on the railroad and other property of the company." * * *

"But the so-called liens must yield to the priority given the United States, for being generally applied to all the property of the company, they are really only a priority in distribution like a judgment lien, which must yield to the statute of Congress as construed by the Supreme Court. This not being a case in bankruptcy, the ruling in Guarantee Title & Trust Co. v. Title Guaranty & Surety Co., 224 U. S. 152, 32 S. Ct. 457, 56 L. Ed. 706, is not applicable to save even the claims of laborers."

Appellant has been unable to discover a Missouri decision in which the facts are identical with the facts in this case, but the Courts of other states have granted the claims of the United States priority under circumstances which were substantially the same as the circumstances herein.

The case of Kupshire Coats, Inc. v. United States, 272 N. Y. 221, 5 N. E. (2d) 715, involved an assignment for the benefit of creditors, and the question was whether a claim of the United States was entitled to priority over the claims of certain laborers who had priority under the State statute and who would have had priority over the United States had the proceeding been in Bankruptcy. The Court concluded that the claim of the United States was prior to that of the laborers.
53 It is interesting to note that in the Kupshire case the specific contention was made that Section 3466 was impliedly amended by the Bankruptcy Act and that the laborers should, therefore, be granted priority. The Court of Appeals

of New York held that the Bankruptcy Act was not applicable since the case was not a Bankruptcy case. The Court said:

"Here we have a corporate entity, the Kupshire Coats, Inc., indebted to the United States for taxes, and insolvent. It has made a voluntary assignment of its assets and, not having sufficient funds to pay all the debts due, those due to the United States are to be first satisfied. The respondents have claimed, and the courts below have held, apparently, that a change or modification in this law was made by the Bankruptcy Act and that the bankruptcy provisions apply to the voluntary assignments for the benefit of creditors under State laws." * * *

"We are of the opinion that these two statutes of the United States should be read together; that all claims of the United States in a voluntary assignment have preference over all other claims, including wages; and that the Bankruptcy Act only applies to cases of bankruptcy and to proceedings in the bankruptcy court, or coming within its jurisdiction."

The decision in the Kupshire case was cited with approval in the case of In re Lincoln Chair & Novelty Co., 9 N. E. (2d) 7, l. c. 8, in which the Court of Appeals of New York said:

"The State of New York has, as sovereign, a common law right of priority in payment of its claims out of the estate of an insolvent debtor, but that common law right of priority has been made subordinate to the statutory priority of the United States. No exception has been made by Congress in favor of claims of the State or of wage-earners or other persons. Upon the voluntary assignment of an insolvent debtor, the mandate of the statute that out of the estate of the insolvent 'the debts due to the United States shall be first satisfied' is absolute. County of Spokane v. United States, 279 U. S. 80, 49 S. Ct. 321, 73 L. Ed. 621."

The Kupshire decision was so cited with approval in the case of In Re Assignment of T. J. Simpson, Inc., 15 N. Y. S. (2d) 1021, in which the Supreme Court of New York said:

54 "That all claims of the United States in a voluntary assignment have preference over all other claims including wages and that the Bankruptcy Act only applies to cases of bankruptcy and to proceedings in the bankruptcy court has become the recognized rule in this state."

In the case of Carpenter vs. Wabash Ry. Co., 103 Fed. (2d) 996 (Mo. C. C. A. 8), which involved a Missouri Railroad receivership, the Court held that the provision of the Bankruptcy Act, which provided in effect that claims of railroad employees for personal injuries should have priority over claims of the United States, had no application to a receivership and that the

United States had priority under Section 3466, notwithstanding that a different result would have been reached had the proceedings been in bankruptcy. The Court said:

"By subsection (n) of Section 77 of the Bankruptcy Act as amended, 11 U. S. C. A. §205 (n) claims for personal injuries to employees of a railroad corporation are entitled to priority. Central Hanover Bank & Trust Company, et al. v. Williams, et al., 8 Cir. 95 F. 2d 210. But this subsection applies expressly to proceedings in Bankruptcy, and at this stage, as charged in the proposed petition, this is an equity receivership."

Appellant has been unable to discover any decision by the Supreme Court of the United States in a receivership case dealing with the priority of claims of the United States under Section 3466 over the claims of laborers who were entitled to priority under the State law and the Bankruptcy Act. However, in the case of New York vs. Maclay, et al., Receivers, et al., 288 U. S. 290, a closely analagous situation was presented. It involved a receivership and dealt with the priority of a tax claim of the United States under Section 3466 over tax claims of the State of New York, which were entitled to priority under the State law, and which would have been payable pro rata with the claim of the United States had the proceeding been in Bankruptcy. The Supreme Court in that case concluded 55 that the tax claim of the United States was entitled to priority over the tax claim of the State, in accordance with the expressed provisions of Section 3466, regardless of the State law and the Court did not concern itself with the fact that a different result would have been reached had the case been in Bankruptcy.

Appellant submits that in view of the foregoing authority the order of the priority set forth in the Bankruptcy Act has no application to or bearing upon receivership cases. It is respectfully urged that this Court was in error in applying to the facts of the case at bar any rule of priority, which might prevail in a bankruptcy case, for the obvious reason that in the instant case there is no bankruptcy within the scope and terms of the Bankruptcy Act. The case at bar involves only a State Court Receivership, which is a proceeding wholly distinct and separate from and governed by different law than applied in cases pending in a Court of Bankruptcy. It is respectfully urged that in the case at bar the claim of the United States was entitled to priority over the claims of laborers under the Statutes and authorities hereinabove cited, and accordingly this appellant asks that the

decision and opinion rendered herein be set aside and the appellant granted a rehearing in accordance with this petition.

Respectfully submitted.

(Signed) HARRY C. BLANTON.
Harry C. Blanton,
United States Attorney.

(Signed) HERBERT H. FREER.
Herbert H. Freer,
Assistant U. S. Attorney.

(Signed) RUSSELL VANDIVORT,
Russell Vandivort,
Assistant U. S. Attorney.

(Signed) WILLIAM L. MAHER,
William L. Maher,
Special Assistant U. S. Attorney,
Counsel for Appellant.

56 Served by mailing a copy of the foregoing Motion and Notice to Respondent's Attorneys of Record, this 29th day of August 1940.

(Signed) RUSSELL VANDIVORT.
Russell Vandivort,
Assistant United States Attorney.

57 In Springfield Court of Appeals

Order overruling motion for rehearing, Sept. 18, 1940

Now at this day, the Court having fully considered the said Appellant's motion for a rehearing of this cause, doth overrule the same.

Opinion filed.

58 In Springfield Court of Appeals

March Term, 1940

[Title omitted.]

Opinion

Filed Sept. 18, 1940

Motion for rehearing denied

Tatlow, P. J., Counsel for the United States as Intervenor, has filed a motion for rehearing citing among other cases, Kupshire

Coats, Inc. v. United States, 272 N. Y. 221, 5 N. E. (2d) 715; Piedmont Corporation v. Gainesville & N. W. R. Co., 30 Fed. (2d) 525. In the Kupshire case the Court of Appeals of New York has reached a contrary conclusion to ours in the instant case. In that case the court arrives at the same conclusion that we do, that the test is whether the State Statute (Section 1168, R. S. 1929) is "inconsistent" and "contrary" to Section 3466 of the Revised Statutes giving priority to the United States. It makes the case turn upon whether that section has been repealed or modified. That Section 3466 has not been repealed is, of course, self-evident. That it has not been directly and expressly, either amended or modified is likewise true. But it seems to us that the court, in that case, clearly overlooked the "generality of the language" of that section, which the Supreme Court of the United States, in the Bramwell case, cited and reviewed in our original opinion, considered both "significant" and controlling. The Kupshire case, as we think, is in conflict with
59 the Bramwell case in holding that the Bankruptcy Act throws no light on the "generality of the language" of that section and seems to overlook the rule plainly announced in the Bramwell case:

"* * * no regard is had to the purpose or manner of the assignment and they include all cases in which an act of bankruptcy is committed under the laws of a state or under a national bankruptcy law (l. c. 488, 489. * * *).

"The priority given does not depend on any proceeding under the bankruptcy laws of the state or nation. There is nothing in the language of the section and no reason has been suggested to indicate a purpose to give priority in the case of a debt due the United States from a debtor subject to the bankruptcy act and to deny priority under like circumstances when the debt is due from an insolvent bank or another debtor to whom the act does not apply." * * *.

The Kupshire case does not mention the case of Mellon v. Michigan Trust Co., 271 U. S. 236, 70 L. Ed. 924, l. c. 926, in which the court denied priority to the Federal Government and said:

"To permit the claimed preference, we think, would conflict with the spirit and broad purpose of the statute. These become plain enough upon consideration of the just ends which Congress had in view, together with the recent policy revealed by the bankruptcy act in respect to priorities."

If the Supreme Court means what it says, which we must assume it does, we must look at the generality of the language of the Statute (Section 3466, supra) for the purpose of determin-

ing its broad policy. We must also look at the recent policy revealed by the bankruptcy act in respect to priorities. In so looking it becomes plain enough to us that the just ends which Congress had in view in using the general language as it did in that section, permits the State, in dealing with labor claims, to establish a preference so long as the State Statute conforms to the Federal Statute as to the conditions upon which the bankruptcy act allows a preference to such claims. While the Bankruptcy Act does not repeal Section 3466, supra, the meaning of that section is to be determined more by the broad policy indicated by the general language of the act, as that policy is not only reflected by that section itself, but by the recent policy revealed by the bankruptcy act in respect to such priority.

60 Section 3466 not only creates a priority in favor of the United States, but also constitutes a limitation upon State authority. While we regret that we cannot reach the same conclusion that the court did in the Kupshire case, the fact still remains that that case neither prevents nor excuses us from exercising our independent judgment in construing Section 3466. Our judgment can only be coerced in the construction of this section by an opinion of the Supreme Court of Missouri or the Supreme Court of the United States. The Supreme Court of Missouri has never had an occasion to deal with the matter directly or indirectly so far as we are advised. With due and proper deference to the opinion of the court in the Kupshire case, we think that the conclusion there reached is contrary to the reasoning of the Supreme Court of the United States with reference to this Statute. We realize that the Supreme Court of the United States, so far as we have been able to ascertain, has never decided the exact question involved in the instant case, and which was involved in the Kupshire case. If our conclusion is wrong the Supreme Court of the United States will no doubt correct it upon proper application.

Counsel for the Intervenor, in citing Piedmont Corporation v. Gainesville & N. W. R. Co., 30 Fed. (2d) 525, say:

"Appellant's further research has disclosed that the exact question involved in this case has already been the subject of a decision of a Federal Court which decision is, of course, binding upon this Court."

We do not agree to either conclusion. That case was rendered by the District Court for the northern district of Georgia and is not binding on us. And neither does it justify us in refusing to decide the instant case according to our independent judgment. Neither do we think that that case decides the exact question

involved in the instant case. In fact, we think it sheds a very dim light on the question involved here.

For these reasons the appellant's motion for rehearing should be and is denied.

W. D. TATLOW, *Presiding Judge.*

SMITH, J., concurs.
FULBRIGHT, J., concurs.

61 And that on the 17th day of December, 1940, there was received from the Supreme Court of the State of Missouri a mandate denying certiorari in this cause, a copy of which is hereto attached:

62 In Supreme Court of Missouri

September Term, 1940

State of Missouri, at the relation of The United States of America, relator

vs.

W. D. Tatlow, Robert J. Smith, and James F. Fulbright, Judges of the Springfield Court of Appeals, respondents

Order denying petition for certiorari

Dec. 3, 1940

Now at this day, on consideration of the petition for a writ of certiorari herein to the said respondents, it is ordered by the court here that the said petition be, and the same is hereby denied.

[Clerk's certificate to foregoing paper omitted in printing.]

63 *Recital as to issuance of mandate*

And that on the same day the Mandate of the Springfield Court of Appeals was sent down to the Circuit Court of Phelps County.

64 In Springfield Court of Appeals

Order recalling mandate

December 20, 1940

Now at this day it is ordered by the Court that the mandate and opinion of this Court, directed to the Circuit Court of

Phelps County on the 17th day of December, 1940, be, and the same is hereby recalled and for naught held and esteemed, and the said Circuit Court of Phelps County is directed to proceed no further in this cause until further notified by the Springfield Court of Appeals.

65 [Clerk's certificate to foregoing transcript omitted in printing.]

U. S. GOVERNMENT PRINTING OFFICE: 1941

Supreme Court of the United States

Order allowing certiorari

Filed April 7, 1941

The petition herein for a writ of certiorari to the Springfield Court of Appeals, State of Missouri, is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE 1941